MEMORANDUM

To: Senior Partner Louisa Waldner
From: Junior Associate **Timothy Ducey**
Re: Butch Blaine will, question of undue influence
Date: April 5, 2010

Question Presented

Under Florida statutory law, did Ms. Iris Wanstead, the younger cousin of Ms. Matty Richards, exert undue influence over Mr. Butch Blaine, Matty Richards' husband, in the making of Mr. Blaine's will and trust?

Statement of Facts

Ms. Matty Richards and Mr. Royce Milhouse were married in 1965, and three years later, in 1968, they had a daughter, Ms. Jillian Milhouse. Royce Milhouse died in 1984, at which time Jillian was 16. Three years later, in 1987, Ms. Richards remarried with Mr. Butch Blaine. To this day, Ms. Richards and her daughter maintain a close relationship, seeing each other several times a year. However, while Jillian and Mr. Blaine had a cordial relationship, they never became close as Jillian went away to college soon after her mother remarried, and then Jillian subsequently was married herself. Thus, Jillian does not consider her step-father a father figure.

Ms. Iris Wanstead is Ms. Richards' younger cousin. The two of them grew up together, and their relationship is more of a sibling sisterly relationship than of merely a cousin relationship. In 2001, as Ms. Wanstead had recently lost her spouse, Ms. Richards and Mr. Blaine invited Ms. Wanstead to live with them as Ms. Richards did not want her cousin to live alone.

Since 2005, as Ms. Richards' mental condition has declined amid the onset of some dementia, Ms. Wanstead's role in the household has become more and more important.

Additionally, over time, because Mr. Blaine had also started to decline due to diabetic complications, Ms. Wanstead's already large role became ever greater. She was now the principal caretaker of both Ms. Richards and Mr. Blaine, taking them to the doctor, picking up their medications, doing their shopping, cooking for them, and handling their cleaning needs.

Around the time Ms. Richards' condition began to decline, Mr. Blaine elected to make a will to provide for Ms. Richards in the event he should happen to precede her in death. Mr. Blaine asked Ms. Wanstead to find a probate lawyer to make Mr. Blaine's will. Ms. Wanstead, upon finding an attorney, made an appointment for Mr. Blaine to discuss his will intentions with the lawyer. Before taking him to the appointment, Ms. Wanstead sat down with Mr. Blaine to help him figure out what he wanted to put in his will. Of primary concern to Ms. Wanstead was that Ms. Richards should not have to worry about finances. Mr. Blaine assured Ms. Wanstead he would provide for both her and his wife. Then, Ms. Wanstead drove Mr. Blaine to the appointment. Mr. Blaine met the attorney while Ms. Wanstead, who did not meet the attorney, waited in the waiting room.

Ultimately, Mr. Blaine elected not to have the attorney draft his will. Rather, he had Ms. Wanstead buy a do-it-yourself law book, and he proceeded to draft his will and trust on his own in longhand on some plain stationery of Ms. Richards'. Upon completion of his writing, Mr. Blaine asked Ms. Wanstead to spell-check his will and trust and ensure it was legible. Then, he had two of his neighbors come to his house to act as witnesses as he signed the will and trust. Upon their arrival, Mr. Blaine and his neighbors held a brief discussion to determine whether Mr. Blaine was of sound mind. They concluded he was, and Ms. Wanstead spread the documents out on a table, and Mr. Blaine signed them while his neighbors watched. The two witnesses also

signed the will and trust. Following the signing, Mr. Blaine gave Ms. Wanstead the documents for safekeeping.

Mr. Blaine died in November of 2009. At this time, Ms. Wanstead showed the will and trust to Jillian and explained she was going to submit the will to probate. The terms of the trust are as follows: 1) Ms. Matty Richards is the principal beneficiary during her lifetime; 2) Ms. Wanstead is the trustee; 3) the trustee, Ms. Wanstead, will exercise discretionary control over distributions made from the trust for Ms. Richards' benefit during Ms. Richards' lifetime; 4) at Ms. Richards' death, Ms. Wanstead will receive the remainder of the trust assets.

Since Mr. Blaine's death, Jillian has become increasingly concerned Ms. Wanstead is more focused on saving money than taking care of Ms. Richards, Jillian's mother. An example of this is that Ms. Wanstead has not enrolled Ms. Richards in adult daycare, something Ms. Richards' doctor has suggested would be good. Thus, Jillian is concerned Ms. Wanstead may have exerted undue influence over Mr. Blaine in the making of the will and trust.

Short Answer

After a thorough analysis of the facts of this case, it will be shown there was a will made by Mr. Butch Blaine. Under *Carpenter v. Carpenter, 253 So. 2d 697* (Fla. 1971) and *Fla. Stat. 733.107* (2010), Jillian Milhouse will be able to show there was active procurement and a presumption of undue influence on the part of Ms. Wanstead in the making of Mr. Blaine's will. The burden of proving there was no undue influence will shift to Ms. Wanstead, and it is highly likely the trier of fact will find Ms. Wanstead did exert undue influence over Mr. Blaine in the making and execution of his will.

Applicable Statutes

Florida Statute § 732.5165. Effect of fraud, duress, mistake, and undue influence

A will is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons. *Fla. Stat. § 732.5165* (2010).

Florida Statute § 733.107. Burden of proof in contests; presumption of undue influence

(1) In all proceedings contesting the validity of a will, the burden shall be upon the proponent of the will to establish prima facie its formal execution and attestation. Thereafter, the contestant shall have the burden of establishing the grounds on which the probate of the will is opposed or revocation is sought.

(2) The presumption of undue influence implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof under ss. 90.301-90.304. *Fla. Stat. § 733.107* (2010).

Florida Statute § 90.301. Presumption defined; inferences

(1) For the purposes of this chapter, a presumption is an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established.

(2) Except for presumptions that are conclusive under the law from which they arise, a presumption is rebuttable.

(3) Nothing in this chapter shall prevent the drawing of an inference that is appropriate.

(4) Sections 90.301-90.304 are applicable only in civil actions or proceedings. *Fla. Stat. § 90.301* (2010).

Florida Statute § 90.302. Classification of rebuttable presumptions

Every rebuttable presumption is either:

(1) A presumption affecting the burden of producing evidence and requiring the trier of fact to assume the existence of the presumed fact, unless credible evidence sufficient to sustain a finding of the nonexistence of the presumed fact is introduced, in which event, the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption; or

(2) A presumption affecting the burden of proof that imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the presumed fact. *Fla. Stat. § 90.302* (2010).

Florida Statute § 90.303. Presumption affecting the burden of producing evidence defined

In a civil action or proceeding, unless otherwise provided by statute, a presumption established primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement public policy, is a presumption affecting the burden of producing evidence. *Fla. Stat. § 90.303* (2010).

Florida Statute § 90.304. Presumption affecting the burden of proof defined

In civil actions, all rebuttable presumptions which are not defined in *s. 90.303* are presumptions affecting the burden of proof. *Fla. Stat. § 90.304* (2010).

Discussion

The absolute basis of this analysis stems from Florida Statute § 732.5165 supra in which "a will is void if the execution is procured by fraud, duress, mistake, or undue influence." *Fla. Stat. § 732.5165* (2010). As fraud, duress, and mistake are not questions of concern in this matter, the focus of the inquiry then is on whether Ms. Wanstead unduly influenced Mr. Blaine in the making of his will and trust. Thus, Flordia Statute § 733.107 supra, regarding the "burden of proof in contests" and "the presumption of undue influence" is the main statute on which the analysis of these facts shall be based. *Fla. Stat. § 733.107* (2010). Florida Statute § 733.107(1) explains "the burden shall be upon the proponent of the will to establish prima facie its formal execution and attestation." *Id*. This is a threshold issue in the facts at hand as the creation of a will must be affirmed before the question of undue influence can be taken up. In order for a will to be executed and attested, "that certain purported will" must be "signed by the said decedent at the end thereof in the presence of two attesting witnesses who were present at the same time the testatrix signed the said will." *In re Carpenter's Estate, 253 So. 2d 697, 698* (Fla. 1971). In the facts at hand, Ms. Wanstead is the proponent, and she must show Mr. Blaine signed his will in the presence of two witnesses who could confirm he was of sound mind. The facts presented clearly show Mr. Blaine did sign his will and trust in the presence of two witnesses who confirmed he was of sound mind, and these witnesses also signed the will as witnesses. Ms. Wanstead should have no problem meeting this burden of "formal execution and attestation" of the will. *Fla. Stat. § 733.107(1)*(2010).

The next issue that must be examined in establishing whether there is undue influence is whether Ms. Wanstead and Mr. Blaine had a "fiduciary or confidential relationship" as mentioned in Florida Statute § 733.107(2). *Fla. Stat. § 733.107* (2010). In the *Carpenter* opinion, the court noted a 1927 case in which it is defined

> The term 'fiduciary or confidential relation,' is a very broad one***The origin of the confidence is immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist wherever one man trusts in and relies upon another.***The relation and the duties involved in it need not be legal. It may be moral, social, domestic, or merely personal. *Quinn v. Phipps, 93 Fla. 805* (1927); *In re Estate of Carpenter, 253 So. 2d 697, 701* (Fla. 1971).

Using this criteria to determine whether Ms. Wanstead and Mr. Blaine had a fiduciary or confidential relationship, it is very clear they did. Because Ms. Wanstead was a friend of Mr. Blaine and Ms. Richards and because Ms. Wanstead helped Mr. Blaine with many matters including cooking, cleaning, and transportation, it is quite clear Ms. Wanstead would qualify as having a fiduciary or confidential relationship under the "domestic, or merely personal" aspects of the definition. *In re Estate of Carpenter, 253 So. 2d 697, 701*(Fla. 1971). In this situation, Jillian, the contestant, would need to establish there was a confidential relationship, and she would be able to.

Following the establishment of an executed and attested will and a confidential relationship, the burden would once again fall upon the contestant, Jillian, to show that Ms. Wanstead actively procured the contested will. As *Carpenter* clearly states, "It is established in Florida that if a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in procuring the contested will, the presumption of undue influence arises." *Id.* at 701. As will be shown, Ms. Wanstead most assuredly meets the criteria of active procurement.

> In *Carpenter*, the court provided a non-exclusive list of factors for consideration in a determination of active procurement: (a) presence of the beneficiary at the execution of the will; (b) presence of the

beneficiary on those occasions when the testator expressed a desire to make a will; (c) recommendation by the beneficiary of an attorney to draw the will; (d) knowledge of the contents of the will by the beneficiary prior to execution; (e) giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will; (f) securing of witnesses to the will by the beneficiary; and (g) safekeeping of the will by the beneficiary subsequent to execution. *Brock v. Brock*, 692 So. 2d *907, 911-912* (Fla. App. 1996); *In re Estate of Carpenter, 253 So. 2d 697, 702* (Fla. 1971).

In laying out these seven factors in the *Carpenter* case, a case in which siblings fought over the issue of undue influence in their mother's will, the Supreme Court of Florida set forth a "non-exclusive" set of criteria for establishing active procurement, meaning every factor need not be present in a given case. *Brock, 692 So. 2d 907, 911* (Fla. App. 1996). Rather, as the court explicated, "We recognize that each case involving active procurement must be decided with reference to its particular facts." *Carpenter, 253 So. 2d 697, 702* (Fla. 1971).

In applying the facts of the present matter concerning Mr. Blaine's will and Ms. Wanstead's potential undue influence, it is quite clear Ms. Wanstead meets at least four of the *Carpenter* factors, and possibly a fifth. Ms. Wanstead, being a beneficiary because she is to receive the remainder of the trust assets upon Ms. Richards' death, and exerting much power because she is to exercise discretionary control of fund distributions from Mr. Blaine's will, played quite an active role in the formulation of Mr. Blaine's will and trust. Ms. Wanstead was present at the will's execution, discussed Mr. Blaine's intention to make a will and discussed the contents of the will with Mr. Blaine before he wrote it, possibly recommended an attorney to Mr. Blaine, and kept the will for safekeeping after its execution. Even if Ms. Wanstead argues she was simply helping Mr. Blaine in her role as a personal friend and helper, she cannot deny she meets a minimum of four of the factors set out in *Carpenter* and quite possibly a fifth. Additionally, her relationship with Mr. Blaine is confidential as per *Carpenter* and *Quinn*. Thus, Ms. Iris Wanstead clearly satisfies the factors leading to a presumption of undue influence as set out in *Carpenter* and *Fla. Stat. § 733.107* (2010), and Jillian would have no difficulty as the

contestant establishing a confidential relationship of the beneficiary, Ms. Wanstead, with the testator, Mr. Blaine, and active procurement of the will by Ms. Wanstead.

The confidential relationship having been established between the beneficiary and the testator, Ms. Wanstead and Mr. Blaine, respectively, and an active procurement of the will by Ms. Wanstead having been shown, the attention of the case must now shift to the second part of Florida Statute § 733.107. This second part of the statute was enacted by the legislature in April of 2002, and it explains "the presumption of undue influence implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof under ss. 90.301-90.304." *Fla. Stat. § 733.107(2)* (2010). Prior to 2002, after a fiduciary or confidential relationship had been established along with active procurement of the will by the beneficiary, the proponent of the will had "the burden of coming forward with a reasonable explanation for [the beneficiary's] active role in the decendent's affairs, and specifically, in the preparation of the will." *Carpenter, 253 So. 2d 697, 704* (Fla. 1971); *Diaz v. Ashworth, 963 So. 2d 731, 735* (Fla. App. 2007). It then became "the responsibility of the trial court to determine whether the proponent has, *prima facie*, satisfied this burden of reasonable explanation." *Diaz, 963 So. 2d 731, 735* (Fla. App. 2007). The decision would then fall "on the traditional evidentiary test of who has proven their case by a preponderance of the evidence." *Id.* at 735. However, since the enactment of *Fla. Stat. § 733.107(2)* in 2002, if the will is "proper" and there is "a presumption of undue influence in the making of the will, the *proponent of the will* has the burden of proving the will was not the product of undue influence. That burden must be met by a preponderance of the evidence as determined by the trier of fact." *Diaz, 963 So. 2d 731, 735* (Fla. App. 2007).

In seeking to create a “public policy against abuse of fiduciary or confidential relationships” the Florida legislature thus imparted in 2002 a higher standard of necessary proof on the part of the beneficiary of the will to prove there was not undue influence in the procurement of the will. *Fla. Stat. § 733.107(2)* (2010). The new standard under the 2002 amendment was in great play in the 2004 case of *Hack v. Janes, 878 So. 2d 440* (Fla. App. 2004). In this case, in which a will was contested, the court explicated very clearly the purpose of the newly enacted statute.

> "A presumption is an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established." § 90.301, Fla. Stat. (2002). "A presumption . . . *requires* that 'once some fact . . . is established, some other fact at issue . . . must be deemed true, at least provisionally.'" *State v. Rolle, 560 So. 2d 1154, 1159* (Fla. 1990) (Barkett, J., concurring specially). Section 90.304 provides that rebuttable presumptions not included within the definition of section 90.303, i.e., presumptions that implement public policy rather than being established primarily as procedural devises, are presumptions affecting the burden of proof or the burden of persuasion. § 90.304, Fla. Stat. (2002); see Charles E. Ehrhardt, Florida Evidence, § 304.1 (2004 ed.) However, "when proof is introduced of the basic facts giving rise to a section 90.302(2) presumption affecting the burden of proof, the presumption operates to shift the burden of persuasion regarding the presumed fact to the opposing party. " Id. *Hack v. Janes, 878 So. 2d 440, 442* (Fla. App. 2004).

Thus, as per the new statute of 2002, the party opposing the revocation of the will holds the burden of proof in producing evidence showing there was not undue influence in the procurement of the will. Additionally, it is left to the trier of fact, usually the judge in wills and trust cases, to evaluate “the question of undue influence by the preponderance (greater weight) of the evidence.” *Id. at 444*; *Cripe v. Atlantic First National Bank, 422 So. 2d 820* (Fla. 1982).

Turning to the facts in question regarding Mr. Blaine’s will, under *Fla. Stat. §733.107(2)* the burden of proof will be on Ms. Wanstead to prove by a preponderance of the evidence she did not exert undue influence on Mr. Blaine in the making of his will. Thus, she will need to rebut the evidence of active procurement very strongly, showing her presence at the execution of Mr. Blaine’s will and her prior discussions with Mr. Blaine about the contents of the will were merely consequential and a result of her being very close in proximity, friendship, and trust to

Mr. Blaine. However, her action thus far of refusing to enroll Ms. Richards in adult daycare seems to indicate her involvement in the procurement of the will was more than consequential. Rather, current evidence suggests Ms. Wanstead had ulterior motives in mind, seeking to coerce Mr. Blaine into leaving all of the control of the will and trust to her with the intention on getting as much of Mr. Blaine's money as possible. Further investigation into Ms. Wanstead's actions will be necessary. But as it stands now, it is highly likely the trier of fact, the judge, would find by a preponderance of the evidence Ms. Wanstead did exert undue influence over Mr. Blaine in the creation and execution of his will as her actions toward Ms. Matty Richards since Mr. Blaine's death suggest more than the desire to simply help Ms. Richards. Ms. Wanstead's actions seem to show a desire to save as much money as possible for herself, thus greatly suggesting undue influence and coercion over Mr. Blaine in the making of his will.

Conclusion

In the matter of Mr. Butch Blaine's will, it can be established a will was created and executed prior to his death in which he made his wife, Ms. Matty Richards, the principal beneficiary of his will and Ms. Iris Wanstead the trustee. Using elements from *In re Estate of Carpenter*, Ms. Jillian Milhouse, Ms. Richards' daughter, can show a presumption of undue influence on the part of Ms. Wanstead as she was quite present and active in the procurement of Mr. Blaine's will. Under *Fla. Stat. 733.107* (2010), first implemented in 2002, the burden of proof to show there was not active procurement of the will and thus no undue influence will shift to Ms. Wanstead. The trier of fact will then be charged with evaluating which argument for or against undue influence is stronger by a preponderance of the evidence. While further investigation into Ms. Wanstead's actions toward Ms. Richards is necessary, as it stands now, Jillian Milhouse has a strong case against Ms. Wanstead, and it is highly likely the trier of fact

would find there was undue influence on the part of Ms. Wanstead in the making of Mr. Butch Blaine's will, thus revoking the probate of Mr. Blaine's will on the grounds Ms. Wanstead exerted undue influence over Mr. Blaine.